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IN THE

Supreme Court of the United States

October Term, 1961

No. 914

BERNARD BAUMGARTEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG
Counsel for Petitioner
110 East 42nd Street
New York 17, New York

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bernard Baumgarten prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 16, 1962.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as an Appendix hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on March 16, 1962. On April 13, 1962, Mr. Justice John M. Harlan granted an order extending the time of petitioner

to file his petition for a writ of certiorari to and including April 30, 1962. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

The following questions are presented in this case:

1. Whether petitioner was properly charged with mail fraud against the Government of the Argentine Republic and whether the proof at the trial was sufficient as a matter of law to prove a "scheme or artifice to defraud" the Government of the Argentine Republic.

2. Whether the district court erred as a matter of law in accepting the witness Horatio Bullrich as an expert witness on the customs law of Argentina, in view of the fact that said witness was not a qualified member of the Argentine Bar and had no experience in the tax, customs and tariff laws of Argentina.

3. Whether petitioner was properly charged in count 2 of the indictment with a crime under Title 18, United States Code, §1001; or whether said count was alleged in order to extend the prosecution and to increase the punishment against petitioner.

Statutes Involved

TITLE 18, UNITED STATES CODE

§1001. *Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes

any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

1341. *Frauds and swindles.*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

1725. *Avoidance of postage by using lower class matter.*

Matter of the second, third, or fourth class containing any writing or printing in addition to the original matter, other than as authorized by law, shall not be admitted to the mails, nor delivered, except upon pay-

ment of postage for matter of the first class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of the Postmaster General such postage shall be remitted.

Whoever knowingly conceals or incloses any matter of a higher class in that of a lower class, and deposits the same for conveyance by mail, at a less rate than would be charged for such higher class matter, shall be fined not more than $100.

STATEMENT OF THE CASE

The Indictment

The indictment in this case contained three counts. Count 1 alleged that between January 1, 1960 and June 30, 1960, petitioner Bernard Baumgarten "devised and intended to devise a scheme and artifice to defraud the Government of the Argentine Republic." This scheme was alleged to have been accomplished by the clandestine importation of nylon hosiery and lace into Argentina through the use of the United States mails without paying the Government of the Argentine Republic any of the customs fees and other duties payable under the laws of said country for the importation of said goods. It was further alleged that the defendant would enclose approximately 38,520 pairs of nylon hosiery and approximately 11,000 yards of lace in approximately 113 packages. It was also alleged that petitioner would falsely label said packages as containing books for the purpose of concealing their contents from the Government of the Argentine Republic and its customs authorities and would thereby defraud said government of customs duties and other fees in excess of $36,000 payable for the importation of said goods.

Count 2 alleged that on or about Jun. 30, 1960, the petitioner made a false, fictitious and fraudulent statement in a matter within the jurisdiction of the Post Office Department to the effect that said 113 packages contained books, whereas in truth and in fact 7 of said packages contained lace and the remainder of them contained nylon hosiery.

Count 3 of said indictment alleged a conspiracy, but upon motion of the defense, at the close of the Government's case, said conspiracy count was dismissed and a judgment of acquittal entered thereon.

The Record

The record in this case before the Court of Appeals consisted of an appendix filed on behalf of petitioner and an appendix filed on behalf of the Government. These appendices have been certified and are submitted to this Court for use with this case, and 9 copies thereof are being filed with this Court for use in connection with this petition.

Pre-Trial Motion

In advance of the trial, petitioner moved before the District Court to dismiss the indictment for failure of the indictment to allege facts constituting any crime against the United States. This motion was denied by the District Court in a memorandum opinion by Honorable William B. Herlands, United States District Judge.

The Facts

The facts in this case disclose that on or about June 30, 1960, petitioner went to the United States Post Office located at 402 West 30th Street, in the City of New York, accompanied by one Abraham Kleiner, a postal employee, and one Sam Fleisher, a truckman (R. 16, 19-20). At that time there was delivered to the Post Office for mailing 113 packages addressed to Libreria San Bernardo, Cocientes 424, Buenos Aires, Argentina. Each package contained petitioner's name and address as the sender, and each was stamped "Books" and each package had postage in the amount of $1.50 paid on the outer wrapper (R. 19-22). According to Mr. Kleiner, he handed up the packages to the receiving clerk at the Post Office (R. 83), but the clerk testified that both Kleiner and the petitioner handed up the packages (R. 19). Kleiner testified that he had previously seen to it that the requirements for mailing out of the country had been observed (R. 81). One of the packages became opened in the mail and then all were examined. It appeared that 107 of them contained nylon stockings and 6 contained lace (R. 34). During that same month petitioner had purchased a large quantity of nylon stockings from Mido Hosiery Mills.

On July 8, 1961, petitioner was interviewed at his home by Postal Inspectors, at which time he stated that he had mailed the 113 packages, that he had done this to avoid customs duties in Argentina and that each package also contained $3.65 in uncancelled United States postage stamps in envelopes inserted into each package (R. 45-48). When petitioner was asked during this interview if he was aware of the higher rate for the shipment of merchandise by parcel post, he stated that there was extra postage contained in each package (R. 48). He also stated that he had

engaged Kleiner, the postal employee, to assist him in mailing these packages and that Kleiner was to receive $2.50 per package (R. 49). He also stated that in 1958 and again in 1960, he had met a man in Argentina named Feivel who proposed that petitioner mail merchandise to him in Argentina in order to avoid the customs duties of that country (R. 49). He stated that about two weeks before June 30, 1960, in response to a telephone call, he met a stranger-man in the lobby of the Hotel New Yorker and that this man informed him that he had come from Feivel, that this man then gave him $16,000 in cash, which petitioner then used to purchase the nylon stockings (R. 50).

In support of the allegations of Count 1 the Government called as an expert witness one Horatio Bullrich. In attempting to be qualified as an expert witness on the customs law of the Argentine Republic, Mr. Bullrich testified that he was a lawyer, having received his degree from the University of Buenos Aires, Argentina, and that he was then employed by an investment banking firm in New York City (R. 90-91). Upon the *voir dire* questions of this witness by petitioner's trial counsel, as to his qualifications, Mr. Bullrich testified that he had never been admitted to the Bar in Argentina and that he had never practiced law as a lawyer, except for six months during his college days before graduating. This law work was of a general legal nature and involved no experience in the practice of tax matters or tariff or duty matters. His work was limited to "look up the jurisprudence", "to go to the courts", and "to make the paper work" (R. 93). Over counsel's objection the trial court permitted this witness to testify as an expert on the customs law of Argentina. It was through this witness that the Government introduced into evidence several documents purporting to set forth the law of Argentina relating to customs importations and the duties imposed by such laws on various kinds of merchandise.

including that involved in this case. Petitioner did not testify as a witness in his own behalf and he was convicted on Counts 1 and 2, receiving a sentence of $500 fine on each count, aggregating a total of $1,000, and consecutive sentences of three months imprisonment on each of Counts 1 and 2, for a total of six months imprisonment.

Reasons For Granting The Writ

The reasons for granting the writ of certiorari in this case relate to the proper administration of federal criminal laws.

1. Petitioner was not properly charged in Count 1 of the indictment with mail fraud against the Government of the Argentine Republic, and in any event, the prosecution wholly failed to prove, as a matter of law, a "scheme or artifice to defraud". There is nothing in the legislative history of the mail fraud statute (Title 18, United States Code, §1341), which makes any alleged scheme or artifice to defraud through the use of the mails applicable to a foreign government. It has never before been contended or suggested that any foreign government could be the object of a mail fraud scheme committed in violation of the laws of the United States. Especially where, as here, the alleged fraud is against the custom laws of the Argentine Republic.

Moreover, in any event, the prosecution failed to prove the requisite Argentine law since its so-called expert witness on this subject was not qualified, as a matter of law, to testify as an expert concerning this subject. Since foreign law must be proven as a fact it would have been simple for the prosecution to have produced an authenticated copy of said law with an authenticated translation thereof, all in accordance with the procedures set forth in

Title 18, United States Code, 3491 and Title 28, United States Code, 1741. This the prosecution did not seek to do in this case, but rather relied upon the testimony of an alleged "expert" witness. This witness, as will be discussed below, was not qualified, as a matter of law, to give testimony on the subject of the Argentine customs laws and accordingly the proof against petitioner as to such foreign law, wholly failed.

2. The District Court erred as a matter of law in accepting the witness Horatio Bullrich as an expert witness on the customs law of Argentina, in view of the fact that said witness was not a qualified member of the Argentine Bar and had no experience in the tax, customs and tariff laws of Argentina. The Court of Appeals stated "that it was within the proper exercise of its discretion for the trial court to admit his testimony as an expert, leaving it for the jury to determine the weight to be accorded such testimony", citing cases. While this is the ordinary rule of law, it is to be remembered that in the first instance it is for the trial court to determine, as a matter of law, whether an expert witness is possessed of the requisite qualifications to hold himself out as such expert and thereupon to submit to the jury the weight to be accorded both the testimony of the witness and his standing as an expert. However, in this case, on the *voir dire* examination, the purported expert immediately conceded that he was not a member of the Argentine Bar and had never practiced law as a lawyer. His experience was limited to being what in America we would term a "law clerk." Like a great many persons in this country who are not lawyers, he possessed a law degree, but never went through the formalities of becoming admitted to the Argentine Bar. There is nothing in this record to show that such formalities include the passing of a bar examination; the witness stated: "I finished my studies, but I haven't gone through the very

formal procedure that you need to get admitted to the Bar" (R. 91). It is significant to note that thereafter this witness did not work in a law office or purport to practice law, rather he became employed by an investment banking firm in New York City (R. 93, 90). He further testified that he had no experience with regard to tax matters or tariff or custom duty matters (R. 93-94). Petitioner's trial counsel argued to the court that the witness was not qualified as an expert, but this objection was overruled (R. 94). Thereupon the witness testified in detail about the law of Argentina relating to customs duties and the publications in which said duties are to be found. Thus petitioner contends that his trial was improperly conducted and that his conviction should be set aside and a new trial ordered.

3. Petitioner was not properly charged in Count 2 of the indictment with a crime under Title 18, United States Code, §1001. Petitioner contends that said count was alleged in this indictment in order to extend the prosecution against him and to increase the possible punishment against him. The gravamen of the charges against petitioner was his attempt to evade customs duties against the Government of the Argentine Republic by mailing packages labelled as books which in reality contained nylon hosiery or lace. In perpetrating such alleged fraud the Government contends that petitioner marked the alleged packages as containing "Books" instead of indicating their true contents. In this way, he paid a lesser rate of postage than would have been necessary had the true contents of these packages been marked on the outside wrappers. In failing to pay the proper amount of postage, petitioner would have been guilty of a violation of Title 18, United States Code, §1723. The punishment for such offense is a fine of not more than $100. However, the prosecution here was seeking to "build up" a case against petitioner, and it charged him with a

violation of the false claims statute (Title 18, United States Code, §1001), a separate felony count. The purported separate act by petitioner to enable such separate count to be charged against him was the alleged marking of the package as containing books instead of nylon hosiery or lace. In effect the prosecution devised a separate crime out of one set of facts and treated the same act as constituting separate crimes under two statutes, the mail fraud statute and the false claims statute. In purported reliance upon the case of *United States v. Beacon Brass Co.*, 344 U. S. 43, the Court of Appeals sustained this procedure. However, that case did not turn on whether one act may be made the basis for two separate felony convictions, but rather was a case in which the question was whether a defendant may be charged either under the false claims statute or the Internal Revenue Code (Title 26, United States Code, §145(b), (1939 I. R. C.)), especially in terms of the possible effect of different statutes of limitations. Here the prosecution has made two separate criminal charges out of one alleged act and petitioner has been given consecutive prison terms on each of these counts.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted.

DANIEL H. GREENBERG
Counsel for Petitioner
110 East 42nd Street
New York 17, New York

April 26, 1962.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 225—September Term, 1961.

(Argued February 14, 1962 Decided March 16, 1962.)

Docket No. 27235

UNITED STATES OF AMERICA,

Appellee,

—v.—

BERNARD BAUMGARTEN,

Appellant.

Before:

CLARK, SMITH and HAYS,

Circuit Judges.

Appeal from conviction on two counts, on trial to the jury in the Southern District of New York, Thomas F. Murphy, *J.*, of violation of 18 U. S. C. 1341 and 18 U. S. C. 1001, and sentence of fine and imprisonment on each count. Affirmed.

THOMAS PAY EDWARDS, Asst. U. S. Attorney, So. District of New York, New York City. (Robert M. Morgenthau, U. S. Attorney and Arthur J. Rosett, Asst. U. S. Attorney, So. District of New York, on the brief), *for appellee.*

NICHOLAS ATLAS, New York, N. Y. (Benjamin Weberman, New York, N. Y., on the brief), *for appellant.*

SMITH, *Circuit Judge*:

This is an appeal from a sentence of fine of $500 and imprisonment for three months, consecutive on each of two counts, on conviction in the United States District Court for the Southern District of New York on trial to the jury, Thomas F. Murphy, *D.J.* The appeal attacks the sufficiency of the indictment and of the evidence and the qualifications of an expert witness on Argentine law. We find no error.

Count One charges appellant with unlawfully placing in the mail certain packages labeled "books" which in fact contained nylon hosiery for the purpose of defrauding the Government of Argentina of import duties, in violation of Title 18 U. S. C. §1341.[1] The Second Count charges appellant with falsely stating the contents of the parcels to the

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[1] §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, §34, 63 Stat. 94.

Post Office Department, in violation of Title 18 U. S. C. §1001.[2]

Whether or not proof of an evil intention is necessary in a prosecution under 18 U. S. C. §1001 (see *McBride* v. *United States*, 225 F. 2d 249, 253 (5 Cir. 1955), cert. denied 350 U. S. 934; *Walker* v. *United States*, 192 F. 2d 47, 49 (10 Cir. 1951)), defendant's admissions amply support an inference of such intent here. The fact that similar misconduct involving proof of other elements is covered by 18 U. S. C. §1723 which provides a more lenient penalty (fine of up to $100) does not bar a prosecution under §1001. See *United States* v. *Beacon Brass*, 344 U. S. 43 (1952); *Guarro* v. *United States*, 237 F. 2d 578, 580 (D. C. Cir. 1956).

Appellant's contention that error was committed in allowing one Bullrich—a graduate of the Law School of the University of Buenos Aires who had performed legal research for six months prior to graduation in connection with his employment by a law firm in Argentina but had never applied for admission to the bar and is presently employed by a broker, dealer, underwriter—to testify as an expert that the customs laws of Argentina provide for an import duty on nylon hosiery is likewise unavailing. Although Bullrich's qualifications may leave something to be desired he was possessed of sufficient training in the field, in view of the relative simplicity of the question, so that it was within the proper exercise of its discretion

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[2] §1001. Statement or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

for the trial court to admit his testimony as an expert, leaving it for the jury to determine the weight to be accorded such testimony. *United States* v. *Alker*, 260 F. 2d 135, 155, 156 (3 Cir. 1958), cert. denied 359 U. S. 906; *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (7 Cir. 1956) (reversed on other grounds 355 U. S. 2 (1957)); *Murphy* v. *Bankers Commercial Corp.*, 111 F. Supp. 608, 611 (S. D. N. Y. 1953); Wigmore, Evidence §561 (3d ed. 1940).

The judgment is affirmed.